

We granted Cotter's petition for review. The American Mining Congress ("AMC") filed an amicus brief and we heard oral argument in this matter. Cotter and the AMC contend that jackleg drilling is not a per se hazardous mining activity. Cotter also asserts that there is no evidence to support the conclusion that Lopez was working in an area where specific hazardous conditions existed. Cotter argues that, even assuming hazardous conditions were present, the contact that Lopez had with other Cotter personnel was sufficient to meet the Commission's Old Ben test.

We conclude that the evidence presented by the Secretary on the present record fails to demonstrate that jackleg drilling is per se hazardous within the meaning of section 57.18-25. We further conclude that even had hazardous conditions existed in connection with Lopez's drilling, the level of contact that he had with others satisfied the requirements of the cited standard as a matter of law.

At the outset, we must dispel misconceptions as to the general meaning of this "working alone" standard. Section 57.18-25 does not prohibit employees from working alone. ^{3/} Contrary to some of the testimony in this case (Tr. 14-15), this standard also does not contemplate that, merely because an employee is working alone, "hazardous conditions" automatically exist. If that were the intended meaning of the regulation, its reference to "hazardous conditions" would be surplusage. Rather, under section 57.18-25, an employee assigned a task alone must have sufficient contact with others (i.e., must be able to be heard or seen) if, and only if, hazardous conditions within the meaning of the regulation are associated with that task. It is equally clear that the standard does not require constant contact in such circumstances. Cf. Old Ben, supra, 4 FMSHRC at 1803-04. Thus, the real question in cases arising under section 57.18-25 where hazardous conditions are shown to exist is whether the employee's contact with others, which need not be continual, was sufficient to satisfy the protective purposes of the standard.

The judge found that an area in which jackleg drilling occurs is one where "hazardous conditions" exist within the meaning of section 57.18-25. 7 FMSHRC at 261-62. The Secretary's position concerning this point is not clear. In his reply brief counsel for the Secretary disclaimed the view that jackleg drilling is per se hazardous, yet during oral argument seemed to agree with the judge's finding in that regard. Tr. Oral Arg. 35-38, 42. In any event, we conclude that the judge's finding is not supported by substantial evidence.

^{3/} If the Secretary wishes to prohibit certain tasks from being performed alone, he may promulgate standards that expressly accomplish that end. Such a standard is not involved here.